


CHAPTER 2

GENERAL NONDISCRIMINATION REQUIREMENTS

It is the policy of the State of Hawaii to ensure that people who have disabilities are not denied access to programs and services offered by the state solely on the basis of their disabilities. This policy is based on federal legislation, including the Americans with Disabilities Act and Sections 503 and 504 of the Rehabilitation Act of 1973, as amended, and State legislation, Hawaii Revised Statutes, Chapter 368. It is reaffirmed by the Governor's Administrative Directive 97-03.

 Refer to **ATTACHMENT C** for a copy of the Governor's Administrative Directive 97-03 on Non-Discrimination to Programs, Services, and Activities of the State of Hawaii on the Basis of Disability.

This policy applies to all programs, services, and activities of departments and agencies of the State of Hawaii.

An EXAMPLE of a "program" is a hospital or health clinic or quarantine station.

An EXAMPLE of a "service" is licensing or testing or an information hotline.

An EXAMPLE of an "activity" is a tour or public hearing or ground-breaking ceremony.

This chapter discusses the major principles of nondiscrimination as applicable to departments and agencies of the State of Hawaii.

2.1 Equal opportunity to participate

In providing access to programs and services of the State of Hawaii, departments and agencies must ensure that:

- (a) qualified individuals with disabilities are not denied an opportunity to participate in and benefit from any program or service;
- (b) individuals with disabilities are afforded an opportunity that is equal to or as effective as that provided others; and
- (c) individuals with disabilities are not required to meet criteria for participation that screen out people with disabilities either directly or indirectly, unless such criteria are necessary for the provision of the program's activities.

EXAMPLE: An individual who is deaf does not receive an equal opportunity to participate in a public hearing conducted by the state if he or she is unable to hear the proceedings.

EXAMPLE: A student who uses a wheelchair does not receive an equal opportunity to participate in a tour if the site is not accessible to individuals who use wheelchairs.

This policy, consistent with the Americans with Disabilities Act, requires an equal opportunity to participate, but does not guarantee equality of results.

2.2 Reasonable modifications of policies, practices, or procedures

Departments and agencies of the State of Hawaii must reasonably modify their policies, practices, or procedures in order to avoid discrimination toward people with disabilities.

EXAMPLE: The Department of Land and Natural Resources maintains parks for the public. There is a 'no pets - no animals' policy when camping in state parks. An individual with a disability is accompanied by a service animal and wishes to have that animal accompany him or her when camping. The Department of Land and Natural Resources must modify the 'no pets - no animals' policy to permit access for this person and the service animal.

EXAMPLE: The Department of Labor and Industrial Relations operates the Unemployment Insurance Program for those individuals displaced from work. The policy requires in-person meetings at the department's office on a periodic basis to maintain one's eligibility status. For a person with a severe mobility impairment whose disability precludes leaving the house, the department must modify its policy to permit phone or mail participation or a home visit.

EXAMPLE: The Department of Defense operates a program for veterans through the Office of Veterans Services. This may include assistance with burial for eligible veterans. The application process, however, may be difficult for a person with a mental disability, particularly someone with a mental illness such as Post-Traumatic Stress Disorder, who may not be able to successfully complete the application process. In this case, the office has an obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied benefits. Modifications to the process may include providing applicants who have mental disabilities with individualized assistance to complete the process.

A modification is NOT required, however, if it would fundamentally alter the nature of the program or activity.

EXAMPLE: A person with a mobility impairment asks the Department of Land and Natural Resources to pave all trails so people in wheelchairs are able to travel on a smoother path. This action would likely alter the fundamental nature of the outdoor trail.

EXAMPLE: The King Kamehameha Celebration Commission arranges the annual Kamehameha Day parade and ceremony to drape leis around the statue of King Kamehameha. A person with an environmental disability who cannot tolerate sunlight and is a pa'u (horse) rider wants the program to change its route to be all in the shade. Doing so, especially to avoid the statue of King Kamehameha, located in the sunlight, would fundamentally alter the program.

2.3 Surcharges and additional requirements

At times, compliance with equal opportunity laws may require an additional cost. Although an additional cost may be incurred by the department or agency, and the cost may be unforeseen or unbudgeted, the department or agency cannot impose extra charges solely upon people with disabilities to cover the costs of these expenses for effective communication, program modifications, or access features.

EXAMPLE: The Hawaii State Library System provides interpreter services to students who are deaf, removes architectural barriers for students who are mobility impaired, and provides readers for students who are visually impaired. A library cannot place a surcharge on an individual student with a disability (such as a single student who is deaf who benefited from interpreter services) or on a group of students who have disabilities (such as all students who have mobility impairments who benefited from barrier removal).

The program or service may not impose any additional requirements or burdens on people with disabilities that they do not require of all other participants in the program.

EXAMPLE: The Department of Commerce and Consumer Affairs has a 30-page set of administrative rules. When the public asks for a copy, the department provides a printed copy and charges \$.25 per page for administrative costs, totaling \$7.50. A person with a visual impairment asks for a set in large print. The department prints a new set on its computer using a larger font, but the large print copy is 90 pages in length. The person may not be charged for 90 pages, but only for 30 pages, the same price charged to other individuals.

2.4 Integrated settings and separate programs

A primary goal of nondiscrimination legislation is the equal participation and inclusion of individuals with disabilities in the "mainstream" of society. A major principle of mainstreaming is that individuals with disabilities must be integrated to the maximum extent appropriate. Programs, services, or activities must be delivered in the most integrated setting appropriate to the person's level of need.

Separate programs to provide equal opportunity to benefit from the program are permitted only when necessary. Such programs, however, must be specifically designed to meet the individual needs of people who have disabilities for whom they are provided.

EXAMPLE: The Department of Human Services, Vocational Rehabilitation and Services for the Blind Division, operates Hoopono, an adult rehabilitation program for persons who are blind and visually impaired. Special skills, such as mobility orientation, braille reading, and a low vision clinic are offered. Such a program is permitted, as the services are specifically designed to meet the needs of persons who are blind.

EXAMPLE: The Department of Health operates a residential community at Kalaupapa, Molokai, for individuals who have Hansen's Disease. Although segregated, this community is permitted as a specialized program whose services are specifically designed to meet the needs of the residents who have disabilities.

EXAMPLE: The Department of Education, Hawaii State Public Library System, operates a specialized library, the Library for the Blind and Physically Handicapped. Because this library specializes in printed materials in alternate format such as braille, audio tape or computer diskettes, a separate program is acceptable.

EXAMPLE: The State Foundation on Culture and Arts hosts an exhibit. Viewers are not allowed to touch the exhibits because handling can cause damage to the objects. The Foundation may offer a special tour for individuals with vision impairments where such individuals are permitted to touch and handle specific objects on a limited basis.

However, when separate programs are provided, qualified people who have disabilities still cannot be excluded from participating in the regular program or required to accept special services or benefits. Individuals may not be required to accept special benefits or programs if they choose not to do so.

EXAMPLE: Residents at Kalaupapa, Molokai, cannot be forced to stay there, but must be permitted to participate in other programs and services of the Department of Health.

EXAMPLE: People who have disabilities may not be denied access to all state libraries even though the Library for the Blind and Physically Handicapped exists. Furthermore, they must not be forced to go to a specialized library if they choose not to participate.

EXAMPLE: People who have visual impairments may not be denied access from the standard exhibit, although they may be required to abide by the "no-touching" policy for regular exhibit pieces.

Qualified individuals with disabilities are entitled to participate in regular programs, even if the program sponsor does not reasonably believe that the person can benefit from the regular program, assuming there are no health and safety factors to be considered.

EXAMPLE: The Department of Education offers hula classes or photography classes through their adult education program. The instructor may not exclude a person who is deaf from the hula class or a person who has low vision from the photography class. The individual who is deaf may benefit from the vibrations of the music beat and the individual who has low vision may benefit from seeing photographs at close range. Even if they don't, they have a right to participate.

The ability to provide full integration, if separate programs are available, will vary on a case-by-case basis.

EXAMPLE: The University of Hawaii conducts theater performances for the public at-large. For a single play performed three nights per week for a month, the University decides to provide a performance interpreted in sign language at one show per week. In setting up the schedule, the University consults the deaf and hard of hearing community, decides on a different show time and day each week in order to offer a full range of choices, and publicizes the availability of the interpreted performances. Given this range of choices, it may not be necessary to provide a sign language interpreter at any other performance to offer complete integration at all performances.

2.5 Eligibility criteria

Programs or services of the State of Hawaii may not impose eligibility criteria which tend to screen out individuals with disabilities unless it can show that such requirements are necessary for the provision of the program, service, or activity or would fundamentally alter the nature of the program, service, or activity.

EXAMPLE: The community college system may not require students who have certain disabilities to be accompanied to class by attendants, when such individuals prefer to attend classes unaccompanied. The policy would have to change unless the college can demonstrate that it is necessary for some compelling reason to adopt such a policy.

EXAMPLE: The community college system may not prohibit people who use wheelchairs from participating in state-sponsored scuba diving classes solely because it believes that individuals who use wheelchairs probably cannot swim well enough to participate. Each student's situation must be considered individually. A blanket exclusion would violate the rights of people who have disabilities.

Likewise, requiring only individuals with disabilities to demonstrate swimming competency would be discriminatory.

2.6 Safety requirements

Departments and agencies may impose legitimate safety requirements for the safe operation of their services, programs, or activities. However, a specific program or service must ensure that its safety requirements are based on real risks, not on speculation, stereotypes, or generalizations about individuals who have disabilities, and must apply these safety requirements to others at risk.

EXAMPLE: A community college may establish a legitimate criteria of swimming as a pre-requisite to enrolling in a scuba diving class if it can demonstrate that being able to swim is necessary for safe participation in the class. It can require all participants to be individually tested to meet that criteria. This is permitted even if requiring such a test would tend to screen out people who have certain kinds of disabilities.

EXAMPLE: The Department of Human Services may require CPR certification for child care operators, if it can demonstrate the need for the health and safety of the children. It can require all participants to be individually tested to meet that criterion. This is permitted even if the criterion eliminates certain people due to their disabilities (e.g., a person with a tracheotomy, a person who has a severe respiratory disorder, a person who has quadriplegia, all of whom may not physically be able to administer CPR).

2.7 Unnecessary inquiries

A program or service may not make unnecessary inquiries into the existence of a disability.

EXAMPLE: A Department of Education recreation program may require parents to fill out a questionnaire and to submit medical documentation regarding their children's ability to participate in various after school and recreation activities. The questionnaire is acceptable, if given to all applicants, and if the department can demonstrate that each piece of information requested is needed to ensure safe participation in the activity. The department may not selectively ask only certain children to provide medical documentation based upon a perception of the child's limitation. The department also may not use this information to screen out children who have disabilities from admittance to the program.

EXAMPLE: A community college program is seeking volunteers to work with at-risk high school students. A person with a disability signs up to be a volunteer. The only eligibility criterion to be a volunteer is to be over 18 years of age and have a high school diploma. The

program's application form asks whether the applicant has ever had a history of a physical or mental impairment. A much more rigorous investigation is undertaken of applicants who answer "yes." This action would place an additional burden on individuals who have disabilities through unnecessary inquiries because such inquiries are not imposed on others without disabilities.

EXAMPLE: A state office open to the public notices that an individual enters with a dog. The office has a "no pets except for service animals policy," which is appropriate. Asking a person to show proof of licensure of the dog as a assistance animal is an unnecessary inquiry.

2.8 Personal devices and services

A program or service is not required to provide individuals who have disabilities with personal or individually prescribed devices, (e.g., wheelchairs, prescription eyeglasses, or hearing aids) or to provide services of a personal nature (e.g., assistance in eating, toileting, or dressing).

EXAMPLE: The Department of Education offers adult education classes in the community. Upon enrolling in a course, one of the students indicates that he is having difficulty seeing the chalkboard for instructions. The department is not required to purchase glasses for the person to enable him to see better. However, if the person were to need an auxiliary aid or service, such as materials in alternate format, these aids would not be considered personal services, and therefore, must be considered.

EXAMPLE: The Stadium Authority operates a public event at the Aloha Stadium. A person who is hard of hearing wishes to attend and listen to the information announced over the public address system. The Stadium Authority is not required to buy the person a hearing aid customized to her hearing loss in order to hear. This is a personal device. However, the Stadium is required to have assistive listening systems and amplification systems which are not customized and can be "checked out" and used by any patron to augment hearing, as a general assistive listening system, not as a personal device or service.

Of course, if personal services or devices are customarily provided to the individuals served by the department or program (such as in a hospital, nursing home, or social service agency), these personal services should also be provided to individuals who have disabilities.

EXAMPLE: The Department of Human Services provides personal care services in its Medicaid Waiver Program. Because it provides services such as bathing, toileting, and grooming to all participants, it must do so for people who have disabilities who are otherwise eligible for the program.

EXAMPLE: The Hawaii Health Systems Corporation provides in-patient care to persons hospitalized in one of its community hospitals. Because it provides services such as nursing services to all patients, it must do so for people who have disabilities who are otherwise eligible for the service.

2.9 Maintenance of accessible features

Programs or services must maintain, in working order, equipment and features of facilities that are required to provide ready access to individuals with disabilities. Isolated or temporary interruptions in access due to maintenance and repair of accessible features are permitted. Also, when an accessible route is provided to the location of a program, service, or activity, the route must remain accessible and not blocked by obstacles such as furniture, cabinets, or potted plants.

EXAMPLE: The State Department of Defense has a three-story building with an elevator. It would not be appropriate if, in order to save energy, the passenger elevator is turned off during the hours when the building is open.

EXAMPLE: The State Department of Accounting and General Services has a lift to provide access for people with mobility impairments to an auditorium stage. The lift is not working. The department must take reasonable steps to repair the lift to meet its obligations to maintain accessible features.

2.10 Contracting with external organizations and procurement contracts

Departments may not discriminate on the basis of disability in contracting for the purchase of goods and services or in any procurement contract.

EXAMPLE: The University of Hawaii, in its contract for food service operations, may not discriminate in its selection of contractors on the basis of disability, either because the company is owned by an individual who has a disability or employs individuals who have disabilities who might be working on the campus.

EXAMPLE: The Department of Transportation, in its contract for parking lot attendant services at the airports, may not discriminate in its selection for or against contractors on the basis of disability, either because the company is owned by an individual with a disability or employs individuals with disabilities who might be working in one of the attendant toll booths at the airport.

EXAMPLE: The Department of Accounting and General Services, in its procurement of goods and services on the state's bid lists, may not discriminate in its selection of contractors for suppliers of equipment,

either because the company is owned by an individual who has a disability or employs individuals who have disabilities.

EXAMPLE: The Department of Public Safety, in its solicitation for consultants to provide services to inmates, may not discriminate in its selection of consultants on the basis of disability by eliminating a consultant who uses a wheelchair because the location of the site where the consultant will be working is not accessible.

2.11 Licensing and certification

Departments and agencies may not discriminate on the basis of disability in their licensing, certification, and regulatory practices. When the state administers an examination as a requirement toward obtaining a license, it must provide auxiliary aids for applicants who have disabilities and administer the examination in an accessible location. An applicant is a "qualified person who has a disability" if he or she meets the essential eligibility requirements for that license or certification.

EXAMPLE: The Department of Commerce and Consumer Affairs Professional and Vocational Licensing Division administers an examination for persons wishing to be licensed as hearing aid dealers. The examination must be held in a location which permits a person who has a mobility impairment to attend. If the examination has a written component and a person who is visually impaired wishes to take the exam, auxiliary aids such as a reader, large print, braille, or audio cassette tape must be provided. If the examination has an audio or oral component and a person who is deaf or hard of hearing wishes to take the exam, auxiliary aids such as a sign language interpreter or computer assisted note taker must be provided.

EXAMPLE: The Public Utilities Commission issues licenses for those entities wishing to operate a vehicle on the street for transportation commerce. In the licensing application process, the department may have to provide an auxiliary aid or service (e.g., reader, sign language interpreter) or modify the licensing application process.

While many programs and activities of the State of Hawaii do not have significant eligibility requirements, licensing programs often do require applicants to demonstrate specific skills, knowledge, or abilities. Those licensing departments may not discriminate against qualified individuals who have disabilities who apply for licenses but may consider factors related to the disability in determining whether a person is qualified.

The department or agency does not have to lower or eliminate licensing standards that are essential to the licensed activity. Whether or not particular requirements are essential must be determined on a case-by-case basis.

EXAMPLE: The Department of Health licenses facilities for adult residential care homes. The department may have a requirement that operators pass a CPR exam. If a person cannot pass the exam due to a disability, the department would not have to lower its standards and eliminate the requirement if it is an essential criterion.

EXAMPLE: The Department of Agriculture licenses farm produce dealers. In the licensing application process, the department may have to provide an auxiliary aid or service (e.g., reader, sign language interpreter) or modify the licensing application process (e.g., to provide additional time). However, the department is not required to eliminate a requirement to pass a written examination because it is too difficult for an applicant with a disability to complete.

In addition, departments and agencies may not establish requirements for programs that are certified or licensed that have the effect of limiting opportunities for participation or employment of people who have disabilities.

This requirement does not impose a responsibility to regulate the activities of privately-run programs that are merely licensed by the state beyond the administrative requirements set forth by state law or state administrative rules. An activity of a licensee does not become a "program or activity" of the state merely because it is licensed by the state.

2.12 Retaliation or coercion

Individuals who assert their rights under disability discrimination laws, or assist others in asserting their rights, are protected from retaliation. The prohibition against retaliation or coercion applies broadly to any individual or entity that seeks to prevent an individual from exercising his or her rights, or to retaliate against him or her for having exercised those rights. Any form of retaliation or coercion, including threats, intimidation, or interference, is prohibited, if it interferes with the rights of that person.

EXAMPLE: A department receives a complaint from a person who uses a wheelchair regarding the lack of accessibility at one of its facilities which recently underwent alterations. In fixing the problem, the department official releases the name, address, and phone number of the complainant and tells the staff to make sure they let the person who has a disability know that he or she is a troublemaker. If this has the effect of intimidating the complainant, it may be considered retaliation by the state department.

2.13 Association

Programs or services may not discriminate against individuals, organizations, or other entities because of their known relationship or association with people who have disabilities. This prohibition applies to cases where the state program or service has knowledge of both the individual's disability and his or

her relationship to another individual, organization, or entity. In addition to familial relationships, the prohibition covers any type of association, if the discrimination is actually based on the disability.

EXAMPLE: A recreation center may not refuse admission to a summer camp program to a child whose brother is HIV positive.

EXAMPLE: A sports facility refuses to admit an individual with cerebral palsy as well as his sister, because they are together. In addition to the individual with cerebral palsy, his sister would have an independent action against the program for discriminating on the basis of association.